

**Passaic Daily News t/a The Herald News and Joseph Lasica. Case 22-CA-10260**

31 May 1983

### DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND  
HUNTER

On 3 February 1982 Administrative Law Judge Arthur A. Herman issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a brief; the General Counsel filed cross-exceptions; and Respondent filed an answering brief.<sup>1</sup>

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions, cross-exceptions, and briefs, and has decided to affirm the rulings,<sup>2</sup> findings,<sup>3</sup> and conclusions of the Administrative Law Judge, and to adopt his recommended Order, as modified herein.

### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Passaic Daily News t/a The Herald News, Passaic, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:<sup>4</sup>

<sup>1</sup> Respondent has requested oral argument. The request is hereby denied as the record, the exceptions and the cross-exceptions, and briefs adequately present the issues and the positions of the parties.

<sup>2</sup> The General Counsel excepts to the ruling of the Administrative Law Judge excluding certain evidence which the General Counsel sought to have admitted into the record on rebuttal; and to the rejection by the Administrative Law Judge of the General Counsel's offer of proof of said evidence. We find that the General Counsel was not prejudiced by its exclusion. Accordingly, we find no merit in the exception by the General Counsel.

<sup>3</sup> Respondent excepts, *inter alia*, to the finding of the Administrative Law Judge that the name of the alleged 8(a)(3) discriminatee, Mitchell Stoddard, appeared on Local 8's campaign literature as a member of the Union's organizing committee, when Stoddard had disavowed the use of his name. The record shows that beginning on, and subsequent to, 28 July 1980 Stoddard's name appeared on 10 pieces of campaign literature, distributed on the stationery of the Union bearing the union letterhead. While it is true Stoddard disclaimed the use of his name relative to the first statement, he testified at the hearing without contradiction that, upon reflection, he decided to join the Union's "organizing committee," never requested that his name be withdrawn from the campaign literature, attended several union meetings, and made personal calls to unit employees urging that they join the Union. Accordingly, we find Respondent's exception to be without merit.

<sup>4</sup> *Sterling Sugars, Inc.*, 261 NLRB 472 (1982).

1. Insert the following as paragraph 2(b) and re-letter the subsequent paragraphs accordingly:

"(b) Expunge from its files any reference to the cancellation of Mitchell Stoddard's column on 15 August 1980 and notify him in writing that this has been done and that evidence of this unlawful action will not be used as a basis for future personnel actions against him."

2. Substitute the attached notice for that of the Administrative Law Judge.

### APPENDIX

#### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT cancel newspaper columns written by our designated employees or refuse to publish these columns in order to discourage membership or activity in International Printing and Graphic Communications Union, Local 8, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL restore Mitchell Stoddard immediately to his former position as a weekly columnist, and resume publication of Stoddard's weekly column, subject to the same lawful standards and requirements that we impose, or may impose, on our employees.

WE WILL expunge from our files any reference to the cancellation of Mitchell Stoddard's column on 15 August 1980 and WE WILL notify him that this has been done, and that evidence of this unlawful action will not be

used as a basis for future personnel actions against him.

PASSAIC DAILY NEWS T/A THE  
HERALD NEWS

DECISION

STATEMENT OF THE CASE

ARTHUR A. HERMAN, Administrative Law Judge: The charge was filed on September 10, 1980, by Joseph Lasica, an individual. A complaint issued on October 24, 1980, alleging that Passaic Daily News, herein called Respondent or Company, violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, by issuing an unfavorable evaluation and cancelling the column of its employee Mitchell Stoddard, and by changing the working conditions and imposing more onerous and rigorous working conditions on its employees, Joseph Lasica and Stoddard, all because of their union activities.<sup>1</sup> Respondent's duly filed answer denied the substantive allegations of the complaint. On February 2, 1981, Lasica filed a second charge in Case 22-CA-10598, and on March 25, 1981, Region 22 issued an order consolidating cases, first amended complaint, and notice of hearing, which incorporated the prior allegations contained in the original complaint and added allegations pertaining solely to Lasica. Respondent duly filed an answer which denied the substantive allegations of the first amended complaint, and then filed a first amended answer which added an affirmative defense of protection afforded by the first amendment to the Constitution of the United States.

This case was heard before me on May 26 and 27 and June 3, 4, 10, 11, 12, 16 and 17, 1981, in Newark, New Jersey.<sup>2</sup>

Upon the entire record in this case, from my observation of the witnesses and their demeanor, and after due consideration of the briefs filed by the General Counsel and Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New Jersey corporation engaged in the business of publication, sale, and distribution of a daily newspaper, maintains its principal office and place of business in Passaic, New Jersey. In the course and conduct of its newspaper operations, Respondent has an annual gross volume of business in excess of \$200,000.

<sup>1</sup> On October 28, 1980, the Regional Director for Region 22 issued an order amending complaint as to certain minor matters, such as correcting the name of the labor organization involved herein, and correcting the spelling of the names of the Charging Party and Respondent's executive editor.

<sup>2</sup> Subsequent to the close of the hearing, in response to the General Counsel's motion filed with me on August 21, 1981, I issued an Order on September 9, 1981, over Respondent's opposition, severing the cases, approving Lasica's request to withdraw his charge in Case 22-CA-10598, and approving the General Counsel's request to withdraw those allegations from the first amended complaint pertaining to that charge together with any portions of the conclusionary paragraphs which were predicated upon those allegations.

Respondent holds membership in, or subscribes to, interstate news services, publishes nationally syndicated features, and advertises nationally sold products. The first amended complaint alleges, Respondent admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

The first amended complaint alleges, Respondent admits, and I find that International Printing and Graphic Communications Union, Local 8, herein called Local 8 or the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent, a wholly owned subsidiary of Drukker Communications, Inc., publishes The Herald News.<sup>3</sup> In addition to its facility in Passaic, New Jersey, Respondent maintains other offices in the State of New Jersey, including an office in Trenton, New Jersey, and an office in the Morris County courthouse in Morristown, New Jersey, called the Morris County bureau. Among its other communications enterprises, Drukker Communications publishes a newspaper from its offices in Dover and Roxbury, New Jersey, which is called the Daily Advance.

Joseph Lasica, the Charging Party herein, was hired in July 1977, by the then executive editor of the Herald News, Coit Hendley, as a municipal beat reporter covering municipalities in Bergen County. On January 15, 1979, Lasica notified Drukker, by letter, that he and some of the other editorial employees had formed an organizing committee and were bent on getting union representation for the editorial employees at the Herald News. From that time onward and through three elections which spanned a period from May 1979 to August 1980,<sup>4</sup> Lasica spearheaded the distribution of union literature and held organizing meetings with the employees to try and convince them to vote for Local 8. The record is abounding with examples of Lasica's union rhetoric.<sup>5</sup> Respondent does not deny that it was aware of Lasica's union activities, and, in fact, made reference to him in their responsive propaganda.<sup>6</sup> It should be noted at this point, however, that prior to the third election, and specifically for the period of July 28 through August 14, 1980, the union campaign literature listed, for the first time, the entire organizing committee by name, including that of Mitchell Stoddard.<sup>7</sup> Stoddard had been hired in

<sup>3</sup> Austin Drukker is the president and publisher of Passaic Daily News.

<sup>4</sup> The first election was held in May 1979; the second in January and February 1980; and the third in August 1980. On March 2, 1981, Local 8 was certified as the collective-bargaining representative for Respondent's editorial employees.

<sup>5</sup> See G.C. Exhs. 10, 12, and 14(a)-(c); also Resp. Exhs. 6-12. All of these exhibits are signed by Lasica, or Local 8 President Schofield, or "The Herald News Organizing Committee."

<sup>6</sup> See G.C. Exhs. 13(a)-(c) and 15(a)-(b).

<sup>7</sup> See G.C. Exhs. 16(a)-(i).

October 1967 by Respondent as its Morris County bureau chief. From October 1967 to March 1978, as Morris County Bureau Chief Stoddard divided his time between administrative duties and writing and reporting. His administrative duties included the assignment of reporters to handle news stories, and the reassignment of reporters to handle breaking news stories; he had to sign off on all timesheets and all vacation requests; he certified all office expenses; he was able to hire and fire bureau employees; and he appraised the bureau employees. As a reporter he covered the Morris County environs, and as a columnist he submitted a weekly column which dealt with issues affecting northern New Jersey, and which, by design, was highly controversial.<sup>8</sup> Stoddard continued as Morris County bureau chief until March 1978 when he was asked by Hendley to take over as night editor. In June 1979 Stoddard returned to his position as Morris County bureau chief.<sup>9</sup>

#### *B. The Events Involving Lasica and Stoddard*

As stated previously, Lasica was employed by Respondent as a municipal beat reporter in July 1977. He was initially assigned to the Bergen County team, at which time the news editor was Diane Pollock and Lasica's supervisor. Pollock prepared Lasica's first appraisal in August 1977, in which she stated "with time and improved attitude, he [Lasica] might become a good reporter-writer." In October 1977, Lasica was transferred to the Essex County team,<sup>10</sup> and was appraised by the managing editor, Richard Paduch, who wrote "attitude will be a key factor. He [Lasica] has ability but not as much or as polished as he believes." Lasica was again transferred at the end of 1977 to the Morris County bureau.<sup>11</sup> It was Lasica's belief that he was being transferred to the Morris County bureau because both Paduch and Pollock wanted him to leave Respondent's employ. When Lasica was first assigned to the Morris County bureau in 1977, Stoddard was the county bureau chief, and it was Stoddard who appraised him.<sup>12</sup> In March 1978, Lasica wrote to Hendley and requested that he be transferred back to the Bergen beat, but the request was not granted. In June 1978, Stoddard wrote up a personnel appraisal report on Lasica in which he stated that Lasica had shown "a marked improvement in his copy. . . . Attitude towards the assignment to the bureau still has room for improvement and his style can

be improved."<sup>13</sup> And, in December 1978, Stoddard appraised Lasica once more, and for the last time. This time he rated Lasica's performance as "acceptable," but still found that Lasica showed a lack of enthusiasm for his present assignment.<sup>14</sup> As stated previously, it was 1 month later, January 1979, when Lasica advised Respondent of his organizing activity; 2 months after that, March 1979, when Lasica became the Morris County courthouse reporter working out of Morristown, New Jersey; and 5 months later, June 1979, when Stoddard returned to Morristown as Morris County bureau chief.

Stoddard testified that while he was night editor, he would meet with Hendley and Paduch on a daily basis to discuss business matters. According to Stoddard, the following incident transpired at one of these meetings:

In the late winter, early spring of 1979 Mr. Handley [sic] called me into his office and said to me that little shit, Joe Lasica, got us a union. I told him I didn't understand. He told me then that the National Labor Relations Board had set a union election and Local 8 and the International Typographical Union were going to participate in the election.

And then he told me I would be voting in the election.<sup>15</sup> I was shocked, and he said, you will vote and vote right. I told him—I said that I am management, I considered myself management, I was the number three man in the newsroom, at night the reporters reported to me, I ran the newspaper, how could I possibly vote in an election.

And he said, don't worry about it. You go ahead and vote. As far as they're concerned, only Dick Paduch and I are management.

I told him that I thought that this would destroy my credibility with the troops and I wouldn't be able to move the newsroom, keep it going, as long as I was one of the boys and no longer in charge of the newsroom, but he said not to worry about it, nothing will change, that I would vote, and he said that if—and I brought up this point. I said, suppose the union wins. And he said, if the union wins, we'll bargain you out of the union.

And again I was shocked and then he said—and here I'm not sure whether it was he or Dick Paduch who said, well, Lasica isn't going to be around much longer anyway, and Coit Handley [sic] then said that Lasica had applied for a job [sic] at Associated Press and he personally had killed it.

And I heard this. I also was told by him that he would see that Lasica never got another job anywhere in the industry after this.<sup>16</sup>

On another occasion in late May 1979, Stoddard testified:

<sup>13</sup> Stoddard wrote that appraisal despite the fact that he had become night editor in March 1978.

<sup>14</sup> All through this period, Lasica performed the ordinary assignments of a municipal beat reporter.

<sup>15</sup> Stoddard voted in all three elections and was not challenged.

<sup>16</sup> Lasica was not hired by AP.

<sup>8</sup> Stoddard contends that the writing of the column was a condition of his original employment in 1967. In 1976, Stoddard's column was discontinued because of a redesign of *The Herald News*. However, in the winter of 1977, Stoddard resumed writing a weekly column for the Sunday edition.

<sup>9</sup> Stoddard testified that the night editor position was considered a promotion, but that he was not anxious to take it because he considered himself a reporter and a writer, whereas an editor did not occupy a writing position. So, when Hendley asked Stoddard if he would like to return to Morris County, Stoddard was delighted.

<sup>10</sup> Both teams operated out of the main office in Passaic.

<sup>11</sup> The Morris County bureau office was located in Parsippany-Troy Hills until February 1979, at which time it was closed. The Morris County bureau then operated out of Passaic until March 1979, when it was moved to the Morris County courthouse in Morristown.

<sup>12</sup> In Resp. Exh. 2 Stoddard stated that Lasica showed a lack of enthusiasm for the job, and was performing below his potential because he resented being assigned to the Morris County bureau.

Coit Handley [sic] called me into his office and asked me if I would like to go back to Morris County. I told him I'd be delighted and he said, well, they're reorganizing the newsroom and as of June 1st—I think this was toward the end of May—that I would be going back to Morris as a bureau chief, and he told me that when I get back to Morris, since it's in the courthouse now, I wouldn't even have to go in if I chose not to, just do the top stories and I should be especially watchful of Joe Lasica and build a record on Joe while I was out there.

I would be the bureau chief and I would be doing investigative stories; I would be in charge of the bureau. This is what Handley [sic] had said, and after I was there a few days I got a call from Handley [sic] who told me I was to report to the news editor and the news editor called me a couple of days later and said that Handley [sic] told her I was to write a news story, a Morris story every day, which shifted the ground rules completely.

Q. Who was the news editor?

A. Miriam Taub.

Q. By whom, if anyone, was the Morris County bureau run after your return, and how was it run?

A. The Morris County bureau was run out of Passaic. Miriam Taub ran the Morris County bureau most of the time and then Carol Sakowitz, when she was made the regional editor. We were given all our assignments by either the news editor or the regional editor. I was not allowed to exercise very much judgment except on the stories that I covered.

Q. Can you explain?

A. The assignments for Joe [Lasica], who was the only other employee there, came from Passaic. I had no say in his assignments, his—he would get the blue memos telling him what to do; I would get blue memos telling me what to do on stories that they wanted written. Many of them were even irrelevant to the Morris bureau.

We did not have control of the Parsippany reporters out of the Morris County bureau. That, again, was done by Passaic.

Hendley confirmed the fact that he met with Stoddard on a daily basis when the latter was night editor, but he does not recall Lasica's name coming up at any of these meetings. And, he denied emphatically ever saying to Stoddard that he did not expect Lasica to be around much longer. With regard to Lasica's having applied to Associated Press for a job, Hendley responded as follows:

A. And I received a phone call from the New Jersey AP bureau chief.

Q. Before you get into that, did Mr. Lasica tell you that he had made this application?

A. No, he did not.

Q. How did you first learn of it?

A. When the call came from Byron Yake, the AP man, who was doing the normal—the routine reference check.

Q. And to the best of [your] recollection, what did you say to Mr. Yake concerning Mr. Lasica?

THE WITNESS: As I recall the conversation, he said Joe Lasica has applied for a summer job at the AP. What do you think of that?

I said well, I'll be happy to see him go, frankly. I hope he gets it. I said what kind of job is it.

He said well, AP doesn't hire people directly. They often do a tryout situation, and we'll try—we have a lot of applicants for this job.

We'll try them out, whoever gets the job, and then offer them permanent employment possibly at the end of the summer.

And he asked me about Joe's work. I said he's a good writer, et cetera. I said you know we've troubles with him. He's trying to organize a union. But I said he probably could make it with your organization.

That was about the extent of the conversation.

Hendley further testified that he did not recall discussing the AP job with Stoddard; that he would never have said to Stoddard that he killed Lasica's chances to go to AP, "because I was anxious to get Lasica out of the office, frankly. It was to my benefit to have him go." Hendley admitted having a conversation with Stoddard just prior to Stoddard's return to the Morris County bureau in June 1979, but denied that he had requested Stoddard "to build a record" on Lasica. Rather, Hendley told Stoddard that Lasica has "been a marginal employee. I want you to keep an eye on him to make sure that he performs according to how we want him to perform."<sup>17</sup>

And so, in June 1979, Stoddard returned to the job of Morris County bureau chief, working out of the Morris County courthouse, with Lasica as the only other employee there.<sup>18</sup> As quoted above, Stoddard testified that Hendley told him that he would be in charge of the bureau and would be performing the same tasks that he did previously. However, within the first week of his return, Stoddard received a call from Hendley advising him that while he would continue to write news stories and his weekly column, he was not to handle the administrative duties of the bureau; that Miriam Taub, the news editor in Passaic would make all administrative decisions; and that Lasica's assignments would henceforth come from Passaic.<sup>19</sup> According to Stoddard, he no longer could hire or fire bureau employees, he could not assign stories to Lasica, he did not sign off on vacations or overtime, he no longer appraised employees, and he

<sup>17</sup> Hendley was permitted to explain this remark and he said, "Because Stoddard was the supervisor for Joe Lasica, and we were talking about how we wanted to improve the coverage and things that had to be done."

<sup>18</sup> The first representation election had been held in May 1979, but in December 1979, the Board adopted *pro forma* the Regional Director's recommendation that one of the Employer's objections be sustained, and it ordered a second election be held.

<sup>19</sup> When Carol Sakowitz became regional editor in July 1980, she assumed Taub's duties with regard to the Morris County bureau.

no longer exercised any of the administrative duties that he previously performed.<sup>20</sup>

The second representation election was held in January and February 1980; but once again, the Board adopted the Regional Director's findings and recommendations sustaining several of the Petitioner's objections, and directed a third election be held. Except for the fact that Lasica spearheaded Local 8's election campaign prior to the holding of the second election, both Stoddard and Lasica continued to perform their normal duties in Morris County going into July 1980.

On July 3, 1980, Hendley issued a memorandum to all employees advising them of the creation of a new venture called Drukker News Service (DNS). The Trenton, Morris County, and New York personnel were assigned to DNS effective July 7, 1980, and would report to Hendley who would direct DNS. DNS was to service all Drukker newspaper properties—The Herald News, The Daily Advance, and Press Publications. Copy originating from Trenton and the Morris bureau was to be sent to The Herald News and The Daily Advance by telecopier. Carol Talley, the managing editor of The Daily Advance, testified that prior to the commencement of DNS she expressed misgivings about the venture, and she and Pam Pallis, the current regional editor for The Daily Advance,<sup>21</sup> both testified as to the failings of the project with respect to the coverage The Daily Advance was receiving from the Morris County bureau as it unfolded during July and August 1980.<sup>22</sup> Inasmuch as the Morris County bureau was manned by only Stoddard and Lasica, the blame was attributed to them. However, James Marvel, the night news editor for The Daily Advance, before he was discharged in June 1981, testified that he was receiving copy from the Morris bureau with regularity, and that Stoddard would call him on an average of four times a week to tell him what stories had been covered and which should be transmitted on the telecopier. Marvel contended that the big problem with DNS was that although The Daily Advance was receiving plenty of copy on the telecopier, the copy they were receiving was not relevant to The Daily Advance's coverage area.

In the midst of the growing pains of DNS, the third representation election was held August 14–15, 1980, and Local 8 was chosen by a wide majority of the unit employees as the collective-bargaining representative of Respondent's writers, photographers, and editors, and later certified as such.

Two days after the election, Sunday, August 17, 1980, Stoddard's regular weekly column did not appear in the

Sunday edition of The Herald News.<sup>23</sup> Stoddard testified that he called Jim Hile, the Sunday editor, for an explanation and was told that shortly after the election results were announced Friday, August 15, 1980, Hendley, "madder than hell,"<sup>24</sup> came down to Hile's office and told Hile to pull Stoddard's column, and Hendley said to Hile, "that's the end of Stoddard's column."<sup>25</sup>

Stoddard further testified that August 21, 1980, he and Lasica were called into Hendley's office. According to Stoddard, Hendley told them that from now on Lasica and Stoddard would have to call in at the beginning of their work shift because Hendley wanted to make sure that they were getting their messages.<sup>26</sup> When Stoddard asked Hendley about the column, Hendley told him that Respondent's new policy was not to have reporters on the street write columns. Stoddard claims he protested and told Hendley that that was not true; that other reporters' columns were still being printed by Respondent; and in support thereof, the General Counsel introduced into evidence columns written by other reporters that postdated August 21, 1980. Although Hendley confirms the fact that he instructed Lasica and Stoddard to call into the office at the beginning of each shift, and cited to them the complaints about the lack of communication that existed concerning DNS, he does not recall any further discussion at that meeting.

On August 26, 1980, in an interoffice memorandum to Stoddard and Lasica, Hendley advised them that due to the dissatisfaction expressed by Robert Noga, general manager of The Daily Advance, the Morris County bureau would no longer service The Daily Advance. In the memo, Hendley indicated that from then on, the prime responsibilities of the Morris bureau would be to cover the courthouse, the county agencies, and the freeholders. And Hendley reiterated what he had told Stoddard and Lasica in the August 21 conference; i.e., they are to check in by telephone each day at the beginning of their shifts. Also, they are to send a budget to the news desk by 5:30 p.m. daily, listing stories that are coming that evening. In closing, Hendley expressed his personal unhappiness with the bureau's performance, and his expectation for improvement. Stoddard testified that he telephoned Hendley on August 26, and that when Hendley told him that The Daily Advance management decided to discontinue the use of the Morris bureau, Stoddard urged Hendley to let him go speak to Noga, but Hendley refused his request and told him not to talk

<sup>23</sup> The column dealt with a recycling effort being attempted by one man.

<sup>24</sup> This quote is from p. 3, par. 7, of Stoddard's affidavit introduced into evidence by Respondent without objection by the General Counsel. See Resp. Exh. 30.

<sup>25</sup> There is no doubt that this is relevant and material hearsay evidence, which was not objected to, as hearsay, by Respondent. It is well settled that hearsay evidence which is admitted without objection may be considered by the trier of fact. *Diaz v. United States*, 223 U.S. 442, 550 (1912). As to the weight that is to be given to such testimony, it is noted that, although Respondent called Hendley to testify, he was not questioned with regard to this incident. Under the circumstances, I give full weight to the testimony and accept it for the truth of what Hendley said to Hile August 15, 1980.

<sup>26</sup> It seems that since July 1980 Lasica and Stoddard had been required to call in but not at any specific time.

<sup>20</sup> At no point in Hendley's testimony does he refute Stoddard's explanation of his duties. In fact, Respondent's own exhibits list Taub as Lasica's supervisor from July 1979 on. See Resp. Exhs. 22(c) and (d), 23, and 24.

<sup>21</sup> She was a reporter for The Daily Advance in July 1980.

<sup>22</sup> Pallis testified to one incident that occurred in July 1980 involving a drug bust, wherein she tried to get the Morris bureau to cover the news story but she could not reach them. Again, in August 1980, Pallis was forced to cover an embezzlement story because the Morris bureau was not available at first, and when she finally did reach Lasica, he was unable to find the story. Pallis further testified to two additional similar incidents that occurred in August 1980.

to anyone at The Daily Advance.<sup>27</sup> Hendley's testimony relates the complaints he was receiving from DNS regarding the Morris County bureau and the steps taken to disassociate the Bureau from DNS.<sup>28</sup>

On August 27, 1980, Lasica called Hendley's office and advised Hendley's secretary that he was ill and would not be in that day. Whereupon, Hendley picked up the phone, complained to Lasica about the number of sick days he had taken that year, and told Lasica that, if he was sick for one more day in 1980, he, Lasica, would have to submit a doctor's note or else he would be docked. When Lasica stated that he had never heard of such a practice previously, Hendley advised him that it was an unwritten company policy.<sup>29</sup>

In early September 1980, Hendley evaluated Stoddard for the prior period under DNS, and concluded that Stoddard's overall performance was unsatisfactory and that his work was frequently unacceptable.<sup>30</sup> Hendley recommended, therefore, that Stoddard's performance be reviewed again in 90 days, rather than the usual 6-month appraisal. Hendley reviewed this appraisal with Stoddard September 17, 1980. Stoddard expressed his disagreement with it, and stated that he felt he had been put on probation. Whereupon Hendley advised him that inasmuch as he, Stoddard, would be reviewed by another supervisor in 90 days, such a shorter review period could work to his advantage. In any event, Stoddard was not reviewed again until the end of May 1981, and then by Carol Sakowitz. Unlike Hendley's appraisal, Sakowitz finds Stoddard's overall performance to be excellent, and comments only in superlatives.<sup>31</sup>

#### Analysis and Conclusions

As stated above, the substantive allegations of the complaint point directly to actions allegedly taken by the Respondent toward Stoddard and Lasica. While it is conceded by Respondent that Lasica is an employee within the meaning of Section 2(3) of the Act, it is Respondent's contention that Stoddard is either a supervisor within the meaning of Section 2(11) of the Act, or a managerial employee,<sup>32</sup> and, in either event, therefore, not protected by the Act.

The record indicates that during Stoddard's earlier tenure as Morris County bureau chief, i.e., from October 1967 to March 1978, he divided his time between administrative duties, as chief, and writing and reporting.

<sup>27</sup> Stoddard stated that he had never met Noga, and that he told Hendley that he was sure he could resolve the difficulties if given the opportunity to talk to Noga. Hendley was not questioned by Respondent's counsel regarding this telephone call.

<sup>28</sup> See Resp. Exhs. 39-43. The latter exhibit, dated September 10 and signed by Drukker, transfers the Morris County bureau from DNS to the jurisdiction of The Herald News editorial department. Henceforth, Stoddard and Lasica would be supervised by Taub or Sakowitz.

<sup>29</sup> On cross-examination, Lasica admitted that on a previous occasion in July 1980, when he had been out sick, Hendley had asked him for a doctor's note and Lasica provided it. See Resp. Exh. 18.

<sup>30</sup> See G.C. Exh. 25.

<sup>31</sup> See G.C. Exh. 26.

<sup>32</sup> Managerial employees have been defined as those employees who formulate and effectuate management policies by expressing and making operative the decisions of their employer, and those employees with discretion in the performance of their jobs independent of their employer's established policy. See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974).

Among his other duties, Stoddard assigned reporters to handle news stories; he approved vacation requests, and he appraised bureau employees.<sup>33</sup> However, when Stoddard returned to the job of Morris County bureau chief in June 1979, after a hiatus as night editor in Passaic, he was quickly apprised of the fact that the bureau would henceforth be run out of Passaic by Miriam Taub; that he and Lasica, the only other employee in the bureau, would be given their assignments by Passaic; and, that he no longer would handle the administrative duties of the bureau. While I do believe that when Hendley told Stoddard that he, Stoddard, would be going back to the Morris County bureau, he should "keep an eye" on Lasica, I do not believe that this remark cloaked Stoddard with a supervisory mantle; nor do I believe that granting Stoddard the title "bureau chief" bedecked him with supervisory status.<sup>34</sup> Stoddard's uncontroverted testimony<sup>35</sup> stated that he could not hire nor fire employees, he did not assign work, he no longer appraised employees, and he possessed none of the supervisory indicia contained in Section 2(11) of the Act.<sup>36</sup> Respondent argues several contentions regarding Stoddard's supervisory status, none of which specifically pinpoints any of the indicia of supervisory status as detailed in Section 2(11) of the Act, and, therefore, none is sufficiently persuasive to require a finding that Stoddard was a supervisor within the meaning of the Act.<sup>37</sup> To the contrary, from all the evidence presented, I find that ever since Stoddard returned to Morris County in June 1979, he devoted all of his time to covering the news of the county and writing about it, and none to the administrative detail of running an office; that was left exclusively with personnel in Passaic. Under the circumstances, I find Stoddard not to be a supervisor within the meaning of Section 2(11) of the Act, but rather an employee as defined in Section 2(3) of the Act.<sup>38</sup>

In the alternative, Respondent alleges Stoddard to be a managerial employee, and, therefore, excluded from the Act's coverage. In support thereof, Respondent cites *Wichita Eagle & Beacon Publishing Co. v. NLRB*, 480 F.2d 52 (10th Cir. 1973), which granted a publisher's petition to review and set aside a Board order, and found an editorial writer to be a managerial employee. Inasmuch as I am of the opinion that Stoddard's duties differ significantly from those of the editorial writer, Wood, in the *Wichita* case, but rather resemble the duties of a newsgathering reporter who does not formulate nor effectuate management policy. I find Stoddard not to be a managerial employee.<sup>39</sup>

<sup>33</sup> As stated above, Stoddard appraised Lasica on three occasions.

<sup>34</sup> *Golden West Broadcasters-KTLA*, 215 NLRB 760, 761 (1974).

<sup>35</sup> See fn. 20, *supra*.

<sup>36</sup> Lasica's unrefuted testimony supports Stoddard's contentions. Lasica was responsible to Taub or Paduch, not to Stoddard.

<sup>37</sup> Respondent alleged that Stoddard considered himself as being in charge of the bureau, that Lasica was "working under" him, and that Hendley told him to "keep an eye" on Lasica. At no time, however, does Respondent state categorically the duties performed by Stoddard that would coincide with those listed in Sec. 2(11) of the Act.

<sup>38</sup> *Bulletin Co.*, 226 NLRB 345, 346 (1976).

<sup>39</sup> See *The Washington Post Co.*, 254 NLRB 168 (1981); *Bulletin Co.*, *supra*.

We come now to an analysis of the specific actions alleged to have been taken by Respondent against Stoddard and Lasica because of their union activity. Although the complaint does not list the pertinent allegations in chronological order, I deem such an approach essential to a thorough understanding of what transpired during the period of July 28 to September 17, 1980.

On July 28, 1980, for the first time, Local 8's campaign literature for the forthcoming election listed the entire organizing committee by name, including Stoddard's. For the period from July 28 through August 14, the first day of the election, Local 8 distributed no less than 10 campaign pamphlets among the employees. There can be no doubt that at least some, if not all, found their way into Respondent's possession, making it fully aware of the employees aligned with the Union.

On August 15, 1980, Local 8 was chosen decisively to represent a unit of Respondent's employees. This was the third election held by the Board, and it was a culmination of a long struggle, led by Lasica, dating back to January 1979, when it first started organizing. The record is replete with letters written by Respondent's representatives to the employees urging them to reject a union. Immediately following the announcement of the results on August 15, Hendley ordered Stoddard's column pulled from the paper, and let it be known that Stoddard's column will not be printed again. No explanation is offered<sup>40</sup> except for the lame and factually untrue excuse, related by Stoddard as having been told to him by Hendley, that it was Respondent's new policy not to have reporters on the street write columns. The uncontroverted evidence presented by the General Counsel negates this; as stated above, columns written by reporters appeared in *The Herald News* after this "new policy" was stated by Hendley. Under the circumstances, the only conclusion that can be drawn from the action taken by Respondent toward Stoddard, especially when one considers the timing of the discriminatory action, was that it was a reprisal against him for having taken an active role on behalf of the Union, a fact well known to Respondent.<sup>41</sup> On that basis, I find that Respondent, by ceasing the publication of Stoddard's weekly column, committed an unfair labor practice, in that it discouraged membership in the Union, in violation of Section 8(a)(3) and (1) of the Act.

Respondent contends that the first amendment to the United States Constitution precludes the Board from engaging in any inquiry involving Respondent's decision not to publish Stoddard's column,<sup>42</sup> or from directing Respondent to resume printing Stoddard's column.

Although the first amendment states that Congress shall make no law abridging the freedom of the press, it does not grant newspaper publishers a "special privilege

to invade the rights and liberties of others." *Associated Press v. NLRB*, 301 U.S. 103, 132-33 (1937). Such publishers have "no immunity from the application of general laws," and the National Labor Relations Act is no exception to this rule. *Id.* at 132.

Under the National Labor Relations Act, discriminatory treatment of an employee because of his union activities is an 8(a)(3) violation, the remedy for which is reinstatement and backpay if appropriate. As I have found above, Stoddard was demoted from his position as reporter/staff writer to reporter because of his union activities, but retained the salary and benefits of his former position. Respondent contends that even if a violation was committed, reinstatement is inappropriate because it impinges on the newspaper's first amendment right to publish the news as it desires to publish it and to enforce its own policies with regard to editing the news.

Respondent's contentions are without merit. In *Wichita Eagle & Beacon Publishing Co.*, 199 NLRB 360 (1972), vacated on other grounds, *supra*, an employee was demoted from her position as editorial writer to editor of the *Sunday Magazine*. The Board found that the demotion was based on the employee's activity in the union and that such employer action violated Section 8(a)(3) of the Act. The Board ordered the discriminatee reinstated to her former position on the editorial page, and that upon such reinstatement she would enjoy the status of any other writer in the editorial page department without discrimination because of her union membership. Additionally, the Board announced that the discriminatee would be subject to the same standards and requirements that Respondent applies to its other employees. *Id.* at 370.

The Board reached a similar result in *RJR Communications, Inc.*, 248 NLRB 920 (1980), in which it specifically addressed the first amendment issue. In that case the respondent eliminated the 6 p.m. newscast and discharged four employees involved in it, claiming that the decision rested on a bona fide business decision made after receipt of the July Nielsen ratings. The administrative law judge found that the discharges were not based on business decisions, but were rooted in discrimination and ordered reinstatement. The Respondent objected to this remedy claiming that it infringed on its first amendment rights. The Board, in affirming the administrative law judge's findings, responded to this contention:

... Since this is a case of unlawful discrimination, and since the media "has no special privilege to invade the rights and liberties of others" ... we do not believe that, merely by restoring the *status quo ante* to remedy Respondent's unlawful discrimination, we infringe its first amendment rights. [*Id.* at 920, fn. 3.]

Consequently, I am of the opinion that I will not infringe upon Respondent's first amendment rights by ordering reinstatement with certain qualifications to restore the *status quo ante* in the instant dispute. While Respondent may object to this remedy on the grounds that it compromises its integrity and freedom of thought, it must be remembered that Respondent's motive herein

<sup>40</sup> Respondent's argument relating to its first amendment right shall be dealt with, *infra*.

<sup>41</sup> Of all the witnesses who testified at the hearing, Stoddard impressed me most by his sincerity in responding to questions. He constantly attempted to think through each question thoroughly before answering so as to make sure that the question was answered accurately and completely.

<sup>42</sup> Over Respondent's objection, I permitted the General Counsel to question Stoddard regarding the cessation of his column. Respondent chose to refrain from asking any questions on this point of any witnesses.

was purely discriminatory as it was based on Stoddard's involvement in the Union. The Board has continually held that the mere fact of union membership does not compromise the integrity or freedom of thought of writers. An employee can be discharged for failure to comply with the policies of the newspaper but cannot be discharged for union membership. *A. S. Abell Co.*, 81 NLRB 82, 84 (1949).

Thus, while the Constitution guarantees to Respondent the freedom to determine the quality of its news and editorial content, it is not immune from the Act's coverage, and it cannot deprive Stoddard of his right to submit his column, subject to management's approval, when such deprivation is discriminatorily motivated. As stated by the Supreme Court in *Branzburg v. Hayes*, 408 U.S. 665, 682-683 (1972):

It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability. Under prior cases, otherwise valid laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed.

I conclude, therefore, that the requirement imposed on Respondent to restore Stoddard as a weekly columnist does not impinge its constitutional right to freedom of press.

Continuing chronologically, the General Counsel contends that when, on August 21, 1980, Hendley told Stoddard and Lasica to report in at the beginning of their work shift, this was an imposition of "more onerous and rigorous terms and conditions of employment." (Quoting par. 11 of the complaint.) Also included in this allegation is Hendley's edict to Lasica on August 27, 1980, requiring Lasica to produce a doctor's certificate for any future illness. The evidence is undisputed that ever since July 1980, Lasica and Stoddard had been required to call in, albeit not at any specific time, and that on a previous occasion in July 1980 Lasica, when asked, produced a doctor's note. However, of more concern to me in analyzing the facts presented was the condition of DNS vis-a-vis the Morris bureau. Unlike the termination of Stoddard's column, which had no relation to DNS, the imposition of tighter controls on the Morris bureau appears to me to be the direct result of the unhappiness expressed by several witnesses with the manner in which the Morris bureau was dealing with The Daily Advance. Without drawing any conclusion as to where the fault lies, I am faced with the obvious fact that dissatisfaction did exist, otherwise why would The Daily Advance terminate its relationship with the Morris Bureau.<sup>43</sup> Under the circumstances, I must conclude that the action taken by Hendley on August 21 requiring Lasica and Stoddard to report at the beginning of each shift was not a reprisal for their engaging in union activity, but was an attempt

to improve coverage and prevent laxity so as to please The Daily Advance. Also, I find that the requirement that Lasica produce a doctor's note in the future was for the same reason and not for the union activity. I therefore am dismissing this allegation in the complaint.

The final allegation to be discussed refers to the unfavorable evaluation issued to Stoddard by Hendley in September 1980. Although the employee performance appraisal form<sup>44</sup> appears to cover the 6-month period commencing March 1, 1980, the date of Stoddard's prior appraisal, Hendley's comments thereon only reflect back to June 1980, when Stoddard returned as Morris County bureau chief, and, even more specifically, are limited to the time during which the Morris bureau serviced DNS. The General Counsel, in contending that the highly critical evaluation was a direct reprisal for Stoddard's union activities, attempts to show, by introduction into evidence of prior appraisals, that never before had Stoddard been so soundly downgraded, and, further, seeks to discredit the testimony of Talley and Pallis. As stated previously, I have no reason to disbelieve the testimony offered by the management of The Daily Advance. They stated, quite clearly, their dissatisfaction with the Morris bureau,<sup>45</sup> laying the blame squarely on Stoddard and Lasica, the bureau's only two employees; and, by voicing their complaints loudly enough to top management, were able to disassociate DNS from the Morris bureau, a move in no way related to the Union's victory. Inasmuch as The Daily Advance was a major source used by Hendley to properly assess Stoddard's work,<sup>46</sup> and Hendley was being held responsible for the Morris bureau's failure to satisfy the needs of The Daily Advance,<sup>47</sup> it is quite understandable that Hendley would issue a negative appraisal to Stoddard. The disassociation of the Morris bureau from DNS and Hendley's discharge are proof positive for me, of the fact that management was dissatisfied with Stoddard's performance, and I find that to be the sole reason for the unfavorable appraisal, especially in view of the absence of any evidence linking the disassociation with the union activity. One further point, as stated above, Stoddard's next appraisal in May 1981 was glowing in praise. Under the circumstances, I find both of the appraisals to be based on merit, as seen by Stoddard's supervisors, and for no other reason. Accordingly, I shall dismiss this allegation in the complaint.

#### CONCLUSIONS OF LAW

1. The Respondent, Passaic Daily News t/a The Herald News, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union, International Printing and Graphic Communications Union, Local 8, is a labor organization within the meaning of Section 2(5) of the Act.

<sup>43</sup> G.C. Exh. 25.

<sup>44</sup> Some of these complaints predated the third election.

<sup>45</sup> In the supervisor's comments section of the appraisal form, Hendley stated, "Discontent with Morris Bureau work has been expressed both by The Daily Advance and by regional editors of The Herald News."

<sup>47</sup> It is noted that Hendley was subsequently discharged on October 31, 1980.

<sup>43</sup> At no time does the General Counsel allege that the termination of the relationship between DNS and the Morris Bureau had anything to do with the union activity at The Herald News, nor do I find same to be the case.

3. Respondent, acting through its agent, violated Section 8(a)(3) and (1) of the Act by canceling Mitchell Stoddard's weekly column because said employee joined and assisted the Union for the purpose of collective bargaining.

4. Respondent did not engage in any other unfair labor practices as alleged.

#### THE REMEDY

As Respondent has been found to have engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent discriminatorily canceled the column of Mitchell Stoddard, I shall recommend that Respondent be required to restore Stoddard to his former position as weekly columnist, and to resume publication of Stoddard's weekly column, subject to the same lawful standards and requirements that Respondent, as an employer, imposes or may impose on its employees. Stoddard's inability or unwillingness to perform as lawfully required shall subject Stoddard to Respondent's full power as an employer.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

#### ORDER<sup>48</sup>

The Respondent, Passaic Daily News t/a The Herald News, Passaic, New Jersey, its officers, agents, successors, and assigns, shall:

<sup>48</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and

1. Cease and desist from.

(a) Discouraging membership and activity in the Union, or in any other labor organization, by canceling employee Stoddard's weekly column because of his union membership and activity.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their Section 7 rights.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Restore Mitchell Stoddard immediately to his former position as weekly columnist, and resume publication of Stoddard's weekly column, subject to the same lawful standards and requirements that Respondent, as an employer, imposes or may impose on its employees.

(b) Post at its Passaic, New Jersey, place of business, copies of the attached notice marked "Appendix."<sup>49</sup> Copies of said notice, on forms provided by the Regional Director for Region 22, after being duly signed by the Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

<sup>49</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."